(3) (5)

Nos. 85-785 and 85-800

In the Supreme Court of the United States

OCTOBER TERM, 1985

RIVER ROAD ALLIANCE, INC., ET AL., PETITIONERS

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

STATE OF ILLINOIS, PETITIONER

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of review in upholding the decision of the Corps of Engineers to issue a temporary barge fleeting facility permit without preparing an environmental impact statement.

2. Whether the Corps' consideration of alternative locations for the facility was adequate under the circumstances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23)[1] is reported at 764 F.2d 445. The opinion of the district court (Pet. App. 28-36) is unreported.

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[1] "Pet. App." refers to the separately bound appendix in No. 85-800.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24-25) was entered on May 17, 1985, and petitions for rehearing were denied on August 8, 1985 (Pet. App. 26-27). The petition for a writ of certiorari in No. 85-785 was filed on November 5, 1985, and the petition in No. 85-800 was filed on November 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In two suits, consolidated in the district court (Pet. App. 28), petitioners challenged the issuance of a permit by the United States Army Corps of Engineers to National Marine Service, Inc., for a temporary barge fleeting facility along the Illinois bank of the Mississippi River.[2] The facility involved is essentially a mooring area accommodating a maximum of 30 barges. The facility is to exist only until completion of a contemplated new lock and dam in approximately 1988 (Pet. App. 2; see note 4, *infra*); it does not entail any permanent alteration of land use or any permanent damage to the scenic characteristics of the area. Indeed, creation of the facility required only installation of three anchors, anchor chains, and mooring buoys to hold the barges in place (Pet. App. 38, 62). The Corps of Engineers permit

[2] Riverway Towing Company submitted the application. While the application was pending, Riverway Towing Company was purchased by National Marine Service. That purchase did not effect any change in the permit proposal or purpose for the facility (Pet. App. 43-44). The administrative record sometimes refers to Riverway Towing Company. However, for simplicity, we refer only to National Marine Service in this brief.

for the facility was issued pursuant to Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403.[3]

The fleeting site is in Navigation Pool 26 or Alton Lake, a pool in the Mississippi River created by Lock and Dam 26. Alton Lake ordinarily experiences heavy barge traffic (Pet. App. 2). At its maximum capacity, the fleeting facility occupies 1,500 feet of the approximately 256 miles of Alton Lake shoreline (Pet. App. 2, 43, 59). The fleeting site is adjacent to the Great River Road, a national scenic highway that parallels the Mississippi River from Minnesota to the Gulf of Mexico (Pet. App. 30). The location is at the extreme upper end of the scenic bluffs along the River Road from Grafton to Alton, a distance of approximately 15 miles (Pet. App. 50). Almost directly landward from the site is a rock quarry (Pet. App. 53). The site is also just downriver from National Marine Service's shipyard and barge repair facility located in Grafton, Illinois (Pet. App. 2). The primary purpose of the facility is to provide an area to moor barges awaiting repair or pickup after repair at the National Marine Service repair yard (Pet. App. 43, 48).[4]

[3] Under Illinois law relating to riparian rights, see *Hardin* v. *Jordan*, 140 U.S. 371 (1891), riparian ownership or, as in this case, a lease from the riparian owner, is also required to establish the fleeting facility.

[4] In addition, National Marine Service intended to use the facility for general fleeting (Pet. App. 48). The limited capacity of existing Lock and Dam 26, and the disruptions caused by the construction of a new Lock and Dam 26, have caused chronic backlogs of barge tows awaiting passage through the lock (Pet. App. 48, 53). Delays of 72 hours at Lock and Dam 26 are not uncommon, and strings of barges held by churning towboats frequently queue up along the

The issued permit required National Marine Service to discontinue use of the site after notification of completion of the new Lock and Dam 26, expected in approximately 1988 (Pet. App. 2, 65). The permit contained several provisions designed to minimize environmental effects. For example, there was a monitoring requirement allowing the Corps to suspend, modify, or revoke the permit if there was evidence of significant damage to a mussel bed located downstream from the site. In addition, the permit prohibited mooring barges with dangerous cargoes, making major repairs, or transferring cargo at the site (Pet. App. 64-65). Other provisions required the minimization of the use of search lights and of noise from bullhorns and machinery (*ibid.*). Pursuant to this permit, National Marine Service operated the fleeting facility at the site during the one and one-half years of district court litigation (Pet. App. 4).

2. The application for the permit in question was submitted in August 1980. Upon receipt of the application, the Corps solicited comments from citizens, government officials, and government agencies. Although it was not required to do so, the Corps also

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River Road. By fleeting barges, these strings can be broken into smaller units, which reduces overall lockage time. Also, the need for towboats to hold barges with their engines running is eliminated (Pet. App. 47-48).

National Marine Service did not anticipate using this facility for general fleeting more than eight months in the year (Pet. App. 43). However, National Marine Service had available until after the permit issued another fleeting area (adjacent to its Grafton repair yard) leased from petitioner, State of Illinois. During the pendency of this lawsuit, the State cancelled the lease for that fleeting facility (Pet. App. 2).

held a public hearing to give interested parties an opportunity to express their views (Pet. App. 2, 9).

In conjunction with its public interest review of the permit application, see 33 C.F.R. Pts. 320, 325, the Corps prepared an environmental assessment (Pet. App. 38-42) and findings of fact (Pet. App. 43-67). Those documents concluded that the temporary fleeting permit would not have a significant effect on the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (Pet. App. 42, 66). The Corps therefore did not prepare an environmental impact statement (EIS). See 40 C.F.R. 1501.4(b).

Specifically, the Corps concluded that the visual and aesthetic impact (which it viewed as an inherently subjective evaluation) was not so "significant" as to require an EIS. The rationale for this conclusion was that the facility is neither permanent nor large, not at the heart of the scenic area, and does not involve or encourage any construction of land-based facilities (Pet. App. 38-39, 49-50). The Corps also concluded that the historic villages of Elsah and Chautauqua would not be significantly affected. The environmental assessment and findings of fact noted that these villages were four miles and one and one-half miles downstream, respectively (Pet. App. 40-41, 62). The Illinois Department of Conservation Historic Preservation Office similarly advised the Corps that the fleet operation would have no effect on historic, architectural, or archaeological sites in the area (1 Admin. Rec., Exh. 7).

The Illinois Department of Conservation (IDOC) and the United States Fish and Wildlife Service (USFWS) initially opposed the fleeting proposal because of its possible adverse impact on a mussel bed

downstream from the fleeting site (1 Admin. Rec., Exhs. 15, 16, 17). Due to questions raised by those agencies, National Marine Service (at the Corps' suggestion) hired a consultant to study the bed and potential impacts (1 Admin. Rec., Exh. 32). The study concluded that the bed did not extend upriver from mile 217.1 (the fleeting site is at mile 217.3), and that the fleeting activity would not increase existing adverse impacts on the mussel bed caused by pollution and boat traffic (*ibid.*).[5] After review of the study and further discussions among the three agencies, USFWS and IDOC indicated that they would withdraw their opposition to the permit provided that a mussel monitoring requirement was included in the permit (1 Admin. Rec., Exh. 55). Because the monitoring plan advocated by the wildlife agencies would have cost the permit applicant $200,000, the Corps concluded that it was unreasonable, and proposed a permit condition requiring a less costly mussel monitoring plan (*ibid.*). Following notification that the Corps intended to issue the permit on that basis, the USFWS requested review of the District Engineer's decision by a higher Corps authority. Assistant Secretary of the Army William Gianelli concluded that further review of the District Engineer's decision was not warranted (Pet. App. 68-70), and a permit was issued to National Marine Service on October 5, 1982.

3. These two cases were filed by the River Road Alliance plaintiffs and the State of Illinois on September 22, 1982, and March 11, 1983, respectively. Plaintiffs alleged, inter alia, that the Corps violated

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[5] No federally-listed endangered species was collected during the study (*ibid.*).

NEPA by failing to prepare an EIS pursuant to 42 U.S.C. 4332(2)(C), and that the Corps failed to study, develop, and describe reasonable alternatives in violation of 42 U.S.C. 4332(2)(E).

The district court entered summary judgment in favor of petitioners, holding that the Corps' issuance of the permit violated NEPA because the Corps failed to take the necessary "hard look" at the environmental consequences of the project and failed to give adequate consideration to reasonable alternatives and other factors. The district court declared the permit invalid, and enjoined National Marine Service from conducting barge fleeting activities at the site. The district court stopped short, however, of deciding that the environmental impacts were so significant that they required preparation of an EIS.

On appeal to the Seventh Circuit the panel majority reversed, with instructions to vacate the injunction and dismiss the lawsuits. The appellate court ruled that the Corps' "decision not to prepare an environmental impact statement will be set aside only if it is an abuse of discretion" (Pet. App. 6). It reasoned that deferential, rather than plenary, review is appropriate because of the "indeterminate" meaning of "significant" in the statutory phrase "major Federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)), and the predictive judgment required in determining whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an EIS (Pet. App. 6). Based on the facts in the administrative record, the panel majority held that the Corps' conclusion that the fleeting facility would not have so significant an impact as to require an EIS was not arbitrary or

capricious (Pet. App. 9-12). The majority also held that the Corps' consideration of alternative sites was adequate under the circumstances, particularly in view of the fact that plaintiffs were unable to show that any plausible alternative site was overlooked (Pet. App. 12-13).[6] Petitioners' petitions for rehearing and suggestions for rehearing en banc were denied by an evenly divided court (Pet. App. 26-27).

ARGUMENT

1. The first question presented in No. 85-800 and the first two questions presented in No. 85-785 are closely related to the question presented in *Dravo Basic Materials Co.* v. *Louisiana*, No. 85-569, in which we have recently filed a brief in opposition.[7] In that case, an applicant for a Corps of Engineers' permit challenges the Fifth Circuit's use of a "reasonableness" standard (instead of the Administrative Procedure Act "arbitrary and capricious" standard) to review the adequacy of an environmental assessment prepared by the Corps before it issued the permit. In our brief opposing certiorari in *Dravo*, we discussed our concern that the test enunciated in that case may not give sufficient deference to agency expertise, but concluded that the judgment in *Dravo*, remanding the case to the district court for reconsideration, did not warrant this Court's review at this time. Nor do we think that further review is warranted in this case, because—although we do not agree entirely with the Seventh Circuit's rationale (see note 8, *infra*)—the case was correctly decided.

[6] Judge Wood dissented (Pet. App. 15-23), agreeing with the district court's evaluation of the record.

[7] We are sending petitioners copies of that brief.

a. As we explained in our brief in *Dravo*, we are in essential agreement with the observation of the court below that "[t]here is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted" (Pet. App. 7). Thus, although the court referred to its test as an "abuse of discretion" standard (Pet. App. 6), and the State petitioners assume that this is equivalent to the "arbitrary and capricious" standard, we do not find particularly significant the words employed by a court in describing the nature of its review. Rather, as the Seventh Circuit correctly noted, the more critical matter is whether the substance of such review was sufficiently deferential. Brief in Opposition at 6-8, in *Dravo Basic Materials Co.* v. *Louisiana*, *supra*. As final agency action based upon an administrative record, albeit an informal one, the Corps' determination that no EIS was required is altogether appropriate for review under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). The deferential standard of review prescribed by Section 706(2)(A) precludes a court from second guessing an agency's scientific or expert judgment (cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-548, 555-558 (1978)) or substituting its judgment for that of the agency as to the wisdom or desirability of a particular project in the guise of reviewing NEPA compliance. *E.g.*, *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*; *Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227-228 (1980).

The Seventh Circuit properly observed these limitations in its review of the Corps' decision that the in-

stant permit should be issued without an EIS.[8] For example, with regard to aesthetic impacts, the court stated that "whether a 1,500 foot line of barges, though undoubtedly an eyesore in a place of natural beauty, represents so significant a degradation of the environment as to require the Corps to prepare an environmental impact statement is a sufficiently close question to prevent us from substituting our judgment for the Corps' " (Pet. App. 10).[9]

b. The River Road Alliance petitioners assert that the court of appeals engaged in a de novo review of the environmental consequences and erroneously sub-

[8] The panel majority opinion suggests a somewhat novel basis for an agency's decision in these types of cases by stating that "to interpret [significant impact] sensibly in particular cases requires a comparison that is also a prediction: whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides" (Pet. App. 6). The Corps does not base its decisions as to the need to do environmental impact statements on the evaluation of cost versus likely benefits. We do not interpret the court's opinion as requiring agencies to embark on such a cost-benefit analysis. The majority opinion, read as a whole, shows that the court reviewed the reasonableness of the Corps' conclusion in light of the intensity and context of the environmental consequences of the issuance of the permit. No more is required—or appropriate.

[9] In upholding the Corps' conclusion that the aesthetic impacts were insignificant, the court below considered all of the evidence, not just the scenic properties of the area on which petitioners entirely rely. This evidence includes testimony that not all people are offended by the sight of barges, that there are already heavy barge traffic and National Marine Service's shipyard in the immediate vicinity, and that the facility is temporary and upon removal will not leave any damage to the scenic properties of the area (Pet. App. 10).

stituted its judgment for that of the Corps.[10] This contention is based on a mischaracterization of the appellate court's holding. In any event, it is difficult to understand how the court of appeals could have substituted its judgment for that of the Corps when it upheld the Corps' determination.[11]

Specifically, the contention (85-785 Pet. 29) is that the court of appeals erroneously recast the main issue on appeal to be whether the Corps should have prepared an environmental impact statement (Pet. App. 4), and that the court should instead have ordered (as did the district court) that the Corps rewrite its environmental assessment and reconsider its decision based on another "hard look" at the environmental consequences.[12]

[10] In contrast, the state petitioner contends that the court of appeals applied too deferential a standard.

[11] Accordingly, the River Road petitioners' quibbles concerning factual findings (85-785 Pet. 31-34) present no question warranting this Court's review—especially insofar as they are based merely on complaint allegations (see *id.* at 4 n.2).

[12] Petitioners err in relying on *Fritiofson* v. *Alexander*, 772 F.2d 1225 (5th Cir. 1985), to support their position here. In *Fritiofson*, another NEPA case involving a Corps permit, the district court held inadequate an environmental assessment that concluded with a finding of no significant impact. As a remedy, the district court ordered preparation of a comprehensive EIS although it had made no finding concerning the likelihood of any significant environmental effects resulting from the issuance of the permits (772 F.2d at 1248). The government did not appeal the holding as to the adequacy of the environmental assessment, because it was willing to supplement that assessment (772 F.2d at 1234). However, the government successfully appealed the order to prepare an

The government argued on appeal, however, that the district court's and petitioner's demand for more written analysis and discussion in the environmental assessment and findings of fact was tantamount to requiring the Corps to incorporate the same type and depth of analysis that is ordinarily made in an EIS into the environmental assessment—a duplicative requirement not sanctioned by NEPA. In other words, the court below was precisely correct in stating that "it [is] hard to see how the Corps could have met [the district court's] objections to the adequacy of its environmental assessment without [preparing an EIS]" (Pet. App. 4). Moreover, in the courts below petitioners supported their contentions that the Corps did not take a "hard look" at the environmental consequences in the environmental assessment by arguing that the facts in the administrative record demonstrated significant impacts requiring an EIS. Thus, the court of appeals reasonably described the principal issue on appeal.

c. The River Road Alliance petitioners also incorrectly assert (85-785 Pet. 38-39) that the court of appeals held that the regulations of the Council on Environmental Quality are not binding on federal agencies. This is a manifestly incorrect reading of the court's decision (see Pet. App. 8). The court of appeals simply characterized the Council's regulatory attempt to define "significantly" (40 C.F.R. 1508.27), as "nondirective" (Pet. App. 8). That description accurately reflects the fact that the regulation lists ten generally-worded factors for consideration in evaluating the intensity of a project's impacts, and ex-

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EIS in the absence of any finding of significant impact (772 F.2d at 1248). *Fritiofson* nevertheless reaffirms the standard enunciated in *Dravo*.

plicitly recognizes that significance varies with the setting of the proposed action. The court of appeals' passing description of the regulation at most suggests that it is too generalized to resolve the ultimate decision as to "significance" in any particular factual circumstance.

d. Seventeen states, filing as amici curiae, contend that a writ of certiorari should be granted because the court of appeals inadequately considered the scenic and recreational value of the area. Besides being refuted by the court's specific focus on that issue (Pet. App. 10), amici's submission has no basis in law. 40 C.F.R. 1508.27(b)(3) does not require, as amici would have it, that the Corps must give determinative weight, in making its NEPA decision, to a state policy of protecting the natural beauty of an area. Rather, that regulation plainly states that consideration is to be given to "[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment" (40 C.F.R. 1508.27(b)(10)). Amici concede (Br. 7) that the Corps considered such legal requirements, and correctly concluded that none were violated.

Amici's argument also erroneously assumes that there has been a consistent governmental policy of protecting the natural beauty of this stretch of the Mississippi River. The record shows otherwise. For example, the City Council of the town closest to the fleeting site (Grafton) and the county government (Jersey County) officially endorsed the permit proposal (3 Admin. Rec. 72, 82-83). And, while the federal government has expended funds for the River Road, so too there is a federal interest in facilitating the use of the Mississippi River for barge traffic

as evidenced by substantial federal expenditures on new Lock and Dam 26. Pub. L. No. 95-502, § 102, 92 Stat. 1695. As for the State of Illinois, it leased a contiguous site for fleeting, it never voiced official opposition on aesthetic grounds during the administrative proceedings (although it was fully consulted by the Corps), and its own agency responsible for historical values concluded that the fleeting permit would have no effect on historic sites (Pet. App. 2; 1 Admin. Rec., Exh. 7). Moreover, the Corps and the Illinois Department of Transportation initially worked together in processing the permit applications made to both agencies by, for instance, holding a joint public hearing (Pet. App. 45-46).[13] That is precisely the sort of state and federal cooperation contemplated by 40 C.F.R. 1506.2.

2. Both petitions present the question of the Corps' compliance with Section 102(2)(E) of NEPA, 42 U.S.C. 4332(2)(E). Even when an EIS is not required, Section 102(2)(E) requires agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." [14] Petitioners argue that the court of appeals erroneously sanctioned an improper delegation to the permit applicant of the Corps' responsibility to study alternative sites (85-

[13] The state agency later withdrew from this joint review effort simply because the state legislature effectively terminated any state permit requirement. 1 Admin. Rec., Exh. 42.

[14] However, an agency may consider a narrower range of alternatives under Section 102(2)(E) than would be required in an EIS. *City of New York* v. *United States Department of Transportation*, 715 F.2d 732, 744 (2d Cir. 1983), cert. denied, 465 U.S. 1055 (1984).

800 Pet. 20; 85-785 Pet. 46-47). Petitioners further argue (85-800 Pet. 18-19; 85-785 Pet. 46-47) that the court erred in suggesting that they "shoulder the burden" of demonstrating that plausible alternative sites were overlooked. Contrary to their arguments, the court's decision is correct and does not conflict with any decision of this Court or any other court of appeals.

a. When the federal action contemplated is simply the issuance of a permit to a private party, the federal agency's NEPA obligation "'is to determine whether the proposed site is environmentally acceptable,' and not, as in the case of a publicly funded project, 'to undertake to locate what [the agency] would consider to be the optimum site for a new facility.'" *Roosevelt Campobello International Park Commission* v. *United States Environmental Protection Agency*, 684 F.2d 1041, 1046 (1st Cir. 1982). Here, for example, the Corps does not have the authority or business expertise to make locational decisions for National Marine Service. Moreover, in order to establish a fleeting facility, National Marine Service must acquire riparian rights as well as obtain a Corps permit. The Corps cannot force riparian owners to grant such rights. National Marine Service submitted to the Corps a consultant's study and other information showing that National Marine Service had reviewed and rejected all alternative sites in reasonable proximity to its repair yard. Other sites did not meet the physical requirements for fleeting, or were not available for lease for fleeting purposes (Pet. App. 12-13; District Court Docket Entry 47 in No. 85-785; 2 Admin. Rec. 19). The Corps District Engineer in his findings of fact opined that prospective alternative sites existed, but in light

of National Marine Service's stringent location needs —*i.e.*, proximity to its repair yard—he concluded that no other site would be an improvement (Pet. App. 58).[15]

While petitioners contended that the Corps failed to study and consider alternative sites adequately, at no time did petitioners identify any feasible alternative site that was not considered. The court below simply held that the Corps was not required to conduct a further study of alternative sites in the absence of any showing by petitioners that the Corps and National Marine Service consultant's study overlooked some plausible alternative site (Pet. App. 12-13).

b. The Corps' acceptance and use of the study and information on alternative sites submitted by National Marine Service is not a NEPA violation. To the contrary, it is sanctioned by the NEPA regulations; indeed, the regulations authorize an agency to allow a permit applicant to provide the entire environmental assessment. See 40 C.F.R. 1506.1(b); 33 C.F.R. Pt. 230, App. B para. 8(b). "Nothing in NEPA

[15] By selective quotation (85-800 Pet. 21), the state petitioner miscasts the District Engineer's finding and evaluation with respect to alternative sites. In context, the District Engineer concluded that alternative sites existed, but that they were too distant to meet National Marine Service's purposes (Pet. App. 58). Consistent with that meaning, the District Engineer explained (*ibid.*) that another permit application (SCNO)—which sought a fleeting permit for an area contiguous to the site in question here—did not have location needs that were as stringent, and that SCNO found an alternative site. SCNO sought a permit for general fleeting purposes only, not, as here, to provide fleeting for a fixed-location repair yard (*ibid.*). Eventually SCNO withdrew its application for the contiguous site and obtained a permit for a site that is located a considerable distance from National Marine Service's repair yard. Pet. App. 58.

or the regulations says that the agency cannot adopt a report furnished by the applicant in whole or in part." *Lake Erie Alliance* v. *United States Army Corps of Engineers*, 526 F. Supp. 1063, 1073 (W.D. Pa. 1981), aff'd, 707 F.2d 1392 (3d Cir.) (Table), cert. denied, 464 U.S. 915 (1983). Accord, *Save Our Wetlands, Inc.* v. *Sands*, 711 F.2d 634, 643 (5th Cir. 1983) (approving Corps' reliance on consultant's report submitted by applicant). That the Corps independently reviewed the study by National Marine Service is demonstrated by the Corps' criticism of certain aspects of it (see pages 15-16, *supra*). The Corps was not obliged by NEPA to ignore that study and conduct its own wholly independent study. Furthermore, National Marine Service's location needs were factors that the Corps properly took into account. The extent to which alternatives must be considered under NEPA is always a function of the objective of the project. See, *e.g.*, *City of New York* v. *United States Department of Transportation*, 715 F.2d at 743; *South Louisiana Environmental Council, Inc.* v. *Sand*, 629 F.2d 1005, 1017 (5th Cir. 1980); *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974).

c. The appellate court also correctly held that petitioners' bald assertion that alternative sites were not adequately studied was insufficient to prove a NEPA violation. In suits challenging compliance with NEPA, the plaintiffs bear the burden of demonstrating that reasonable alternatives were not considered. *E.g.*, *Texas Committee on Natural Resources* v. *Marsh*, 736 F.2d 262, 270 (5th Cir. 1984);[16] *Life*

[16] In that case, the Fifth Circuit stated (emphasis in original): "[T]he district court required the Corps to prove that its selection of alternative water-supply sources was reason-

of the Land v. *Brinegar*, 485 F.2d 460, 471 (9th Cir. 1973), cert. denied, 416 U.S. 961 (1974); *Roosevelt Campobello International Park Commission*, 684 F.2d at 1047.[17] Thus, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. at 553-555, this Court responded to an argument that an alternative was impermissibly omitted from consideration by emphasizing that a challenging party must alert the agency in the administrative proceeding to its contentions; comments must be specific and focused, not merely a "cryptic and obscure reference to matters that 'ought to be' considered" (*id.* at 554).

The Corps' consideration of alternative sites was adequate under the circumstances. Particularly in view of the fact that petitioners utterly failed to demonstrate at any stage of the administrative or judicial proceedings that any plausible alternative site for this fleeting facility was overlooked, the court of appeals had no basis for finding otherwise.

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able. This approach turns the review process on its head: it is the party seeking to invalidate an EIS, *not the agency*, which has the burden of proof on this issue. The plaintiffs continue this error on appeal. In their brief, rather than argue that they have demonstrated the choices to be unreasonable, they argue that the Corps has not demonstrated these choices to have been reasonable."

[17] The State petitioner's sole support (85-800 Pet. 22) for the proposition that a plaintiff challenging NEPA compliance has no such burden of proof is *Scherr* v. *Volpe*, 466 F.2d 1027, 1034 (7th Cir. 1972). The cited passage in *Scherr* simply states that the irreparable harm for purposes of a preliminary injunction flowed from the NEPA violation, so that plaintiffs did not have the burden of proving interim irreparable environmental harm.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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